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CASE NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JIMMY LEE CLARK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER 28 U.S.C. SECTION 2254(d) MANDATES THAT A FEDERAL COURT REVIEWING A STATE PRISONER'S HABEAS CORPUS PETITION AFFORD DEFERENCE TO FACTUAL DETERMINATIONS MADE BY THE STATE JUDICIARY WHERE REFERENCE TO THE TOTALITY OF THE STATE COURT RECORD DEMONSTRATES THAT THE STATE COURTS APPLIED THE CORRECT CONSTITUTIONAL STANDARD IN ARRIVING AT SUCH FACTUAL DETERMINATIONS.

II. WHETHER AN ERRONEOUS JURY INSTRUCTION REGARDING AN ELEMENT OF A CRIMINAL OFFENSE CAN EVER BE CONSIDERED HARMLESS ERROR WHEN FURTHER INSTRUCTIONS TO THE JURY ARE CURATIVE OF THE ERROR.

PARTIES

The petitioner in this action is R. C. Marshall in his capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is Jimmy Lee Clark.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Clark v. Jago,* 676 F. 2d 1099 (6th Cir. 1982) (A - 1). The decision of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported. (A - 34). The decision of the Supreme Court of Ohio is reported as *State v. Clark,* 55 Ohio St. 2d 257 (1978) (A - 46). The decision of the Ohio Court of Appeals for the Eleventh Judicial District is unreported. (A - 50).

JURISDICTION

The decision of the United States Court of Appeals was entered on April 23, 1982 (A - 1) and rehearing *en banc* was denied on September 13, 1982. (A - 33) Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

and Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

and 28 U.S.C. Section 2254(d):

> (d) In any preceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the

> evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JIMMY LEE CLARK,
Respondent.

STATEMENT OF THE CASE

Respondent, Jimmy Lee Clark, was indicted by the October 1975 Term of the Lake County, Ohio Grand Jury on one (1) count for the crime of aggravated murder with a death penalty specification in violation of Ohio Revised Code Section 2903.01 and one (1) count for the crime of aggravated robbery in violation of Ohio Revised Code Section 2911.01. Respondent, while represented by counsel, was tried to a jury and found guilty as charged. Subsequent to an ensuing mitigation hearing, the Ohio trial court found the mitigating circumstance listed in Ohio Revised Code Section 2929.04. On May 19, 1974, respondent was sentenced to a term of life imprisonment for the crime of aggravated murder and to a term of from seven (7) to twenty-five (25) years

imprisonment for the crime of aggravated robbery. The court ordered that said sentences be served consecutively.[1]

Prior to trial, respondent filed a motion to suppress statements which he had given to law enforcement officers. Pursuant thereto the state trial court conducted a full and fair evidentiary hearing. The following salient facts were developed therein: (1) that respondent was initially taken into custody by officers of Cuyahoga County, Ohio, on a wholly unrelated criminal charge; (2) that respondent refused to make a statement regarding the Cuyahoga County crime and was returned to his jail cell; (3) that law enforcement officers of Lake County, Ohio, identified a fingerprint found at the murder scene as that of respondent and, upon learning of respondent's whereabouts, proceeded to the Cuyahoga County Jail; (4) that after the Lake County officers arrived, Cuyahoga County officials informed respondent that the Lake County officers had a warrant which charged respondent with capital murder, that respondent requested to speak with the Lake County officers and, pursuant to such request, was led to a room where the Lake County officers were located; (5) that respondent was advised of his *Miranda* rights and waived such rights; (6) that respon-

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1. Respondent was also indicted by the January 1976 Term of the Cuyahoga County, Ohio Grand Jury on one (1) count for the crime of attempted aggravated murder in violation of Ohio Revised Code Sections 2903.01 and 2923.02 and on one (1) count for the crime of aggravated robbery in violation of Ohio Revised Code Section 2911.01. Respondent was tried and convicted but said convictions were reversed by the Court of Appeals for the Eighth Judicial District and the case was remanded for retrial. Respondent thereafter entered a plea of guilty to the lesser offense of felonious assault in violation of Ohio Revised Code Section 2903.11 as charged in the first count and a nolle prosequi was entered as to the second count. Respondent was sentenced to a term of from two (2) to fifteen (15) years imprisonment. The court ordered that said sentence be served concurrently with that previously imposed by the Court of Common Pleas of Lake County.

dent made inquiry of the Lake County officers[2] and was informed that his fingerprint had been found on a gas station safebox shortly after the filling station had been robbed and the attendant murdered; (7) that respondent asked to see the fingerprint and was shown an 8 x 10 enlargement; that respondent then stated that he and an accomplice had, in fact, robbed the gas station but that it was his accomplice who had killed the attendant[3] ; (8) that the Lake County officials then asked respondent to reduce his statement to writing; (9) that respondent asked for an attorney and respondent was returned to his jail cell; (10) that the Lake County officers then made arrangements to transport respondent to the Lake County Jail for processing[4] ; (11) that prior to the leaving of the Cuyahoga County Jail, Lake County officers briefly initiated further questioning and respondent made a second statement; (12) that in transit to the Lake County Jail, the police officers took respondent to the scene of the crime where respondent confessed a third time; (13) that respondent was taken to the Lake County Jail and processed; (14) that officers were preparing to return respondent to the Cuyahoga County Jail[5] when respondent stated that he wanted to turn "state's evidence" and expressly asked to give a statement[6] ;

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2. After escorting respondent to the room where the Lake County officers were located, the Cuyahoga County officers left and were not present during any statements which respondent thereafter made regarding the Lake County homicide-robbery.

3. This was the first of four (4) confessions which respondent gave. All four (4) statements were materially identical.

4. Ohio has a county rather than state-wide system of law enforcement. Unde this system, a crime committed in a certain county may only be prosecuted by that county's law enforcement officials.

5. As Cuyahoga County officials had initially arrested respondent, they had the first right of prosecution as to their charges against respondent.

6. Respondent initiated the conversation wherein he requested to make the statement.

(15) that at his request, respondent was taken to an interrogation room; (16) that respondent was again given his *Miranda* rights and signed a form expressly waiving said rights; (17) that respondent attempted to "make a deal" with the officers but was told that they did not have such authority; (18) that a prosecutor arrived shortly thereafter and respondent was once again read the *Miranda* warning and waived said rights; (19) that the prosecutor told respondent to "think about it" before making a statement and informed respondent that no promises could be made; (20) that respondent thereupon gave a fourth statement which reiterated that he and his accomplice robbed the gas station but asserted that his accomplice was the trigger-man; (21) that respondent was again asked to give a recorded statement at which time respondent requested that an attorney be present and all questioning immediately ceased.

Respondent chose to testify at the pre-trial suppression hearing and asserted that he had at all times demanded an attorney and, in any event, had never made the statements attributed to him by the law enforcement officials.

At the conclusion of the evidentiary hearing, the state trial court ordered respondent's second and third statements suppressed but overruled the motion as to respondent's first and fourth statement.

Respondent appealed his conviction to the Ohio Court of Appeals for the Eleventh Judicial District. Therein, respondent challenged both the trial court refusal to suppress all four (4) of his statements and the trial court's instruction on the issue of aider and abettor. The appellate court rejected said claims and affirmed the trial court judgment. (A - 50).

Respondent thereafter sought discretionary review before the Supreme Court of Ohio. The court granted

leave to appeal and affirmed the appellate court judgment.[7] *State v. Clark,* 55 Ohio St. 2d 257 (1979) (A-46). Respondent's ensuing petition for writ of certiorari was denied by this Court with three Justices dissenting. *Clark v. Ohio,* 440 U.S. 950 (1979).

Respondent then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Eastern Division. The district court adopted in whole the following findings of the magistrate: (1) that the state court rulings with respect to the admissibility of respondent's statements were fully supported by the record and; (2) that taken within the context of the overall charge, the state trial court's instruction regarding an "aider and abettor" did not violate the Due Process Clause of the Fourteenth Amendment. (A - 35). As such, the district court dismissed the petition as without merit. (A - 34).

The United States Court of Appeals for the Sixth Circuit reversed the district court judgment. (A - 1). The circuit court thereafter denied petitioner's motion for rehearing and suggestion of rehearing en banc. (A-33).

This petition has followed.

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7. The Supreme Court of Ohio did not grant review with respect to the suppression of statements claim. By law, the court is free to limit its review to those issues in any individual case which a sufficient number of its members deem worthy of discretionary review. The sole exception to this rule exists where the death penalty has been imposed.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. WHETHER 28 U.S.C. SECTION 2254(d) MANDATES THAT A FEDERAL COURT REVIEWING A STATE PRISONER'S HABEAS CORPUS PETITION AFFORD DEFERENCE TO FACTUAL DETERMINATIONS MADE BY THE STATE JUDICIARY WHERE REFERENCE TO THE TOTALITY OF THE STATE COURT RECORD DEMONSTRATES THAT THE STATE COURTS APPLIED THE CORRECT CONSTITUTIONAL STANDARD IN ARRIVING AT SUCH FACTUAL DETERMINATIONS.

The instant case presents important questions regarding the scope of this Court's decisions in *Sumner v. Mata,* 449 U.S. 539 (1981)[8] and *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). Both decisions involve the deference which a federal court sitting in a 28 U.S.C. Section 2254 action must afford to factual findings which were made by the state judiciary subsequent to a full and fair evidentiary hearing. In *Sumner v. Mata, supra,* this Court held that 28 U.S.C. Section 2254(d) mandates that a federal court sitting in a habeas court action must afford a presumption of correctness to factual determinations made by the state judiciary unless the state inmate demonstrates by "convincing" evidence that such factual findings are erroneous or otherwise demonstrates that he falls within the enumerated exceptions to the statutory

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8. *Opinion after remand,* 649 F. 2d 713 (9th Cir. 1981), *vacated,* ___ U.S.___, 71 L. Ed 2d 480 (March 22, 1982) [*Sumner* II].

mandate. In *LaVallee v. Delle Rose, supra,* this Court held that a federal reviewing court ". . . may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied," *Id.* at 694, citing *Townsend v. Sain,* 372 U.S. 293, 314-315 (1963). The Court further held that a state court's failure to expressly articulate credibility findings is of no import where ". . . it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him." *Id.* at 692.

The circuit court below simply did not comply with this Court's directives. While this Court "is not a forum for the correction of error,"[9] the opinion of the circuit court evidences a fundamental misapprehension of the *de novo* review functions of the federal judiciary in light of 28 U.S.C. Section 2254. Moreover, the error of the circuit court is not isolated to the instant case but has been compounded in other decisions. *See,* e.g., *Lonberger v. Jago,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub nom. Marshall v. Lonberger,* _____U.S._____, 71 L. Ed 2d 292 (January 11, 1982); *Fowler v. Jago,* 683 F. 2d 983 (6th Cir. 1982). Where a series of circuit court decisions demonstrate a clear misunderstanding of this Court's opinions, review is warranted in order to avoid judicial chaos.

In support of its decision not to apply the presumption of correctness mandated by 28 U.S.C. Section 2254(d), the circuit court cited the following two factors: (1) ". . . doubt as to whether the [state] trial court correctly utilized the legal standards for waiver of constitutional rights under the Fifth and Sixth Amendments."

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9. *Anderson v. Harless,* ___U.S.___, 32 Cr. L. 4063 (November 1, 1982) (dissenting opinion).

(A - 25) and; (2) ". . . the total absence of fact finding [by the state trial court]." (A - 23). Neither circuit court holding can withstand reasoned scrutiny in light of the state court record.

As previously noted, respondent made four (4) statements to law enforcement officials. While the substance of each statement was materially identical, each was made on a separate and discreet occasion. At the conclusion of the evidentiary hearing, the state trial court allowed respondent's first and fourth statements but suppressed respondent's second and third statements.

The trial court found respondent's initial statement asmissible by stating:

> This Court finds from the facts presented that on December 13, 1975, the defendant came into contact with two officers of the Willoughby Police Department, Mr. Collins and Mr. Reeves. This was not defendant's first confrontation with law enforcement. He had previous interrogatory confrontations and had on other occasions been informed of his rights under such circumstances. He was not illiterate and admittedly had progressed in school to the eleventh grade. Shortly before his first confrontation with these two officers, he had been read his rights by a Cleveland Detective and refused to answer and had demanded a lawyer, in a distinctly separate investigation. Detective Gibbons of the Cleveland Police Department stated that at that interrogation after the usual Miranda warning was read, the defendant was asked if he understood his rights, and he

> said that he did. Mr. Collins of the Willoughby Police Department read the Miranda warning to defendant upon first contact. The defendant stated that he knew his rights and wanted to cooperate and did cooperate with an inculpatory statement. This factual fabric was corroborated by Detective Reeves.
>
> * * *
>
> These two officers both testified that when defendant was requested to reduce his oral statement to writing, Defendant demurred and said that he wished an attorney. At that point, he was returned to the detention facility.
>
> * * *
>
> Mr. Clark, the defendant, stated in testimony upon this hearing that he knew that oral statements made by him could be used against him. This admission on the record negates the interpretation that he misunderstood the legal effect of his speaking to Detectives Collins and Reeves.

The trial court gave the following rationale for suppressing respondent's second and third statements:

> Clearly any statement made by defendant after his original meeting with the officers of the Willoughby Police Department would amount to continued questioning after an expression by defendant that he wished to consult an attorney absent extenuating circumstances wherein

> the defendant being fully aware of his rights reopened the dialogue. This right to counsel was declared by the U.S. Supreme Court in *Miranda v. Arizona*, to be an indispensable right. Specifically any statements made by defendant at or about 10:30 a.m. December 13, 1975, on the third floor of the Cleveland Police Department and any statements made on the same date at the scene of the alleged offense are suppressed.

The trial court articulated the following reason for allowing the admission for respondent's final statement:

> At the Willoughby Police Station, the defendant evinced a desire to cooperate or to turn "State's Evidence" if there was a promise that his cooperation would be made a matter of record and passed on to the prosecutor and judge. Officer Reeves wrote a note somewhat to this effect, however, this note was destroyed. Prosecutor Pat Jones appeared at the Willoughby Police Station and read the defendant the Miranda warning and asked defendant if there was anything he wished to ask. The defendant in response asked:
>
> > ". . . if I really tell who really did it, you understand, I mean, that means I really get charged with the same thing still?"
>
> In answer, Mr. Jones informed the defendant that he could make no promises. To this, the defendant responded:

> "Well really I wanted to turn State's Evidence, that's what I really wanted to do."
>
> It is clear from the total testimony that at this point, Mr. Clark wanted to make the best deal that he possibly could. Mr. Clark testified that he clearly understood his rights after they were read by Mr. Jones. It must reasonably follow that having been given the appropriate Miranda warning and understanding it and having expressed a desire to exculpate himslef, any statement given by defendant must have been voluntary.

The foregoing pronouncements of the state trial court are clearly supported by the record and, while not expressly so stating, most assuredly demonstrate that the trial court did not credit the testimony tendered by respondent. Even absent such findings, the record of the pre-trial evidentiary hearing and the resultant ruling of the trial judge demonstrate beyond peradventure that the court credited the testimony of the police officers and discounted that of respondent. As aptly noted by the federal district court, the reasoning of the state trial court is "apparent from the testimony." (A-41). Indeed, the district court interpretation of the state court's ruling is the *only rational construction* that can be made. The circuit court's holding that reconstruction of the facts impliedly found by the state trial court "would be pure speculation" (A-28) is tantamount to a declaration that the state court acted out of sheer whim and caprice without any regard whatsoever to a rational view of the evidence before it. Such a denigration of the state judiciary hardly bespeaks a recognition that both state and federal judges share co-equal responsibilities in the administration of federal constitutional law. *Townsend v. Sain, supra,* at 314.

The initial statement tendered by respondent was in clear accord with the dictates of *Miranda v. Arizona,* 384 U.S. (1966) and *Michigan v. Mosley,* 423 U.S. 96 (1975) and was properly admitted while the second and third statements were a violation of respondent's Sixth Amendment right to have counsel present during questioning and were, accordingly, suppressed. The final statement of respondent was given after respondent *initiated* contact with the officers and requested that he be permitted to turn "state's evidence" and, as such, was admissible. *Edwards v. Arizona,* 451 U.S. 477 (1981).

The district court properly afforded the presumption of correctness mandated by 28 U.S.C. Section 2254 (d). The failure of the circuit court to comply with this Court's rulings in *Sumner v. Mata, supra* and *LaVallee v. Delle Rose, supra.*[10] warrants review by this Court in order to assure judicial consistency.

The circuit court below also held that it was impossible to discern from the state court record whether the trial court had applied the correct federal standard in making its ruling on the suppression. Again, the record itself belays the circuit court's apprehension.

The sole question before the state trial court was whether respondent has waived his Fifth and Sixth Amendment rights embodied in the *Miranda* warning prior to making each of the separate statements. After the conclusion of the pre-trial evidentiary hearing, both respondent's counsel and the prosecutor tendered argument prior to the trial court's ruling. Both parties agreed that the standard to be employed was that as articulated in *Johnson v. Zerbst,* 304 U.S. 458 (1938).

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10. The circuit court did not so much as take cognizance of the *LaVallee v. Delle Rose, supra* decision.

Indeed, respondent's defense attorney expressly made reference to the *Johnson v. Zerbst, supra* standard and argued to the trial court as follows:

> . . . these statements by Mr. Clark were not the product of his free, voluntary, knowing and intelligent waiver of his rights to counsel and against self-incrimination, understanding what the consequences would be and accordingly, these statements should be suppressed . . . [Tr. T. Vol. II, page 72].

The standard for a valid waiver of federal constitutional rights has been in existence for almost four decades. The judge in respondent's case was an experienced and capable jurist who sat as an Ohio appellate court judge but was expressly commissioned by the Supreme Court of Ohio to sit as a trial judge for the purpose of respondent's case. Absent some definitive indication to the contrary, it is respectfully submitted that it does violence to both the judge's competence and the record in this case to simply speculate that a long standing constitutional standard was not properly employed.

As the circuit court opinion fails to follow the directives of this Court and as such failure is not isolated to the instant case, the petition for writ of certiorari should be granted.

II. WHETHER AN ERRONEOUS JURY INSTRUCTION REGARDING AN ELEMENT OF A CRIMINAL OFFENSE CAN EVER BE CONSIDERED HARMLESS ERROR, WHEN FURTHER INSTRUCTIONS TO THE JURY ARE CURATIVE OF THE ERROR.

The instant case presents an important issue of constitutional law regarding the scope of federal habeas corpus review of a state court inmate's conviction where the federal reviewing court finds that an isolated portion of a state trial court's jury instruction is violative of the Due Process Clause of the Fourteenth Amendment but acknowledges that subsequent portions of the state trial court's instruction are fully curative of the perceived initial defect. The question presented is of national importance as it definatively states a recurrent issue with which the lower federal courts are ever increasingly faced. A resolution of the issue is imperative in order to both guide the lower federal courts that must routinely decide such questions and to alleviate the federal-state friction which portends to undermine the foundations of comity and federalism upon which our nation was founded.

Respondent was charged as an aider and abettor to the slaying of the victim, i.e., the prosecution did not endeavor to prove that respondent was the actual "triggerman." As correctly noted by the circuit court, Ohio does not follow the traditional or common law "felony murder" doctrine. Rather, the prosecution must prove beyond a reasonable doubt that the aider and abettor possessed the requisite *mens rea*. Under Ohio law, where persons enter into a common design to commit a robbery and the participants are aware that a deadly weapon is to be employed to commit the felony, such evidence is sufficient to allow a jury to find a purposeful intent to kill as against an aider and abettor even though the aider and abettor was not actually present at the time of the

homicide. *State v. Lockett,* 49 Ohio St. 2d 48 (1976). This principle was reaffirmed when the Supreme Court of Ohio reviewed respondent's conviction. *State v. Clark,* 55 Ohio St. 2d 257 (1979). However, the establishment of such evidence by the prosecution only provides a sufficient evidentiary basis upon which the trier of fact *may* infer purposeful intent to kill and it is reversible error for the trial court to instruct the jury that the *mens rea* element has been proven as a matter of law. *State v. Scott,* 61 Ohio St. 2d 155 (1980).

In respondent's case, the trial court initially instructed the jury as follows:

> It must be established in this case that at the time in question there was present in the mind of the defendant and/or his accomplice a specific intention to cause the death of Joseph H. Bradshaw, Jr.

As the jury "could" have interpreted the foregoing instruction as alleviating the prosecution of the burden of proof with respect to respondent's individual *mens rea,* both the circuit court and the district court found that such an instruction, *standing alone,* would constitute a violation of the Due Process Clause of the Fourteenth Amendment. *Sandstrom v. Montana,* 442 U.S. 510 (1979).

Having agreed that the instruction quoted above, when viewed in isolation, constituted a due process violation, the district court and the circuit court parted company.

The district court applied the following analysis:

> . . . due process required that the court instruct the jury that to convict Mr. Clark

of aggravated murder it must, among other elements, find that he possessed an intention or purpose to kill. In determining whether the jury was correctly instructed as to the element of purpose a single instruction to the jury may not be judged in artificial isolation, of the overall charge, *Cupp v. Naughten,* 414 U.S. 141 (1973).

During the course of its instructions the court informed the jury that petitioner was presumed to be innocent (T, Vol. 4, p. 383). The court subsequently instructed the jury (T, 390):

> Before you can find the defendant guilty of aggravated murder you must find beyond a reasonable doubt that Joseph Bradshaw, Jr. was a living person; that his death was caused by the defendant in Lake County, Ohio on or about the 7th day of December, 1975; that the killing was done purposely and that the kill was done while the defendant was committing aggrvated robbery.

The court then defined purpose, wherein was inserted the sentence emphasized herein the petitioner (T, 390-391). The court then defined an accomplice and further noted in part that, "When two persons have a common purpose to commit a crime and one does one part and a second performs another, those acting together are equally guilty of the crime." (T, 391). The court quoted Ohio Revised Code Section 2923.03 for the jury as follows (*id.*):

> No person acting with the kind of culpability required for the commission of an offense shall do any of the following: Aid or abet another in committing the offense.

The Court then instructed (T, 391):

> Before you can find Jimmy Lee Clark guilty of aggravated murder in the first count of the indictment you must find beyond a reasonable doubt that he aided, abetted, assisted or encouraged another, Willie Jones, to purposely cause the death of Joe Bradshaw, Jr.

The charge of aggravated murder against petitioner also had a specification that he committed the crime while also committing aggravated robbery. The court instructed the jury that the issue surrounding the specification raised a separate question. As noted by the court (T, 394), "That separate question which you will be called upon to decide is, did the defendant, Jimmy Lee Clark, purposely cause the death of Joseph Hiram Bradshaw, Jr., while committing aggravated robbery." (T, 393). The court then informed the jury that a finding of guilty on this question "must be proved beyond a reasonable doubt" (*id.*).

> When the one sentence portion of the charge quoted by petitioner is viewed in isolation use of the word "or" within the phrase "and/or" would potentially focus attention of the jury only on whether petitioner's accomplice had a purpose to kill. However, this sentence was not prefaced by an instruction as to what elements the state had to prove beyond a reasonable doubt. Consideration of this isolated sentence within the context of the overall instructions readily reveals that the jury was instructed that it must find petitioner had the purpose to kill if it was to find him guilty of aggravated murder.

The district court thus correctly recognized that "a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973). The district court correctly noted that respondent was charged with both the substantive offense of aggravated murder and a death penalty "specification." The trial court instructed the jury that the "specification" was a *separate question* which the prosecution had to establish beyond a reasonable doubt. The trial court instructed the jury that they had to find beyond a reasonable doubt:

> . . . did the defendant, Jimmy Lee Clark, *purposely* cause the death of Joseph H. Bradshaw, Jr. [emphasis added].

It is undisputed that said instruction was in accord with due process dictates. The district court thus held that as

the jury returned a verdict of guilty as to *both* factual determinations any initial error was cured as the jury obviously found beyond a reasonable doubt that respondent had the requisite *mens rea.* Without analysis, the circuit court simply disagreed by stating the latter instruction "did not cure the ambiguities on the basic aggravated murder charge." (A - 12).

The question of whether a faulty jury instruction is susceptible to a finding of harmless error has been expressly left open by this Court. *Sandstrom v. Montana, supra* at 526-527. Indeed, this Court only recently heard argument on precisely this question. *Connecticut v. Johnson,* No. 81-927 (argued Ocotber 13, 1982). The instant case presents an even more compelling instance of harmless error as the trial court clearly corrected any initial error in its later jury instructions.

As the question presented herein is one of recurring nature and as it has been expressly reserved in prior decisions of this Court, certiorari should be granted to resolve this issue of national importance.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on respondent, Jimmy Lee Clark, by forwarding such copies through the office of his counsel, Albert E. Purola, 38052 Euclid Avenue, Willoughby, Ohio 44094, by United States Mail, postpaid, this _____ day of November, 1982. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

Opinion, April 23, 1982, United States Court of Appeals for the Sixth Circuit, *Clark v. Jago,* 676 F.2d 1099 (6th Cir. 1982), reversing district court judgment . . . . . A - 1

Order, September 13, 1982, United States Court of Appeals for the Sixth Circuit, denying petition for rehearing . . . . . A - 33

Order, December 10, 1980, United States District Court for the Northern District of Ohio, Eastern Division, dismissing petition for writ of habeas corpus . . . . . A - 34

Opinion, August 16, 1978, Supreme Court of Ohio, *State v. Clark,* 55 Ohio St. 2d 257 (1978), affirming the appellate court judgment . . . . . A - 46

Opinion, May 31, 1977, Ohio Court of Appeals for the Eleventh Judicial District, affirming the trial court judgment . . . . . A - 50

No. 81-3042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIMMY LEE CLARK,
Petitioner-Appellant,

v.

ARNOLD R. JAGO,
Respondent-Appellee.

APPEAL from the United States District Court
for the Northern District of Ohio.

Decided and Filed April 23, 1982.

Before: KEITH and MARTIN, Circuit Judges; and DUNCAN, District Judge.*

DUNCAN, District Judge. Jimmy Lee Clark was convicted of aggravated murder and aggravated robbery after a trial by jury in the Court of Common Pleas for Lake County, Ohio. Although the jury found one of the Ohio statutory criteria for the imposition of the death penalty to have been met,[1] the Court found a mitigating circumstance[2] and sentenced Clark to life imprisonment for aggravated murder and to a term of seven years imprisonment for aggravated robbery. The sentences are to be served consecutively.

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*The Honorable Robert M. Duncan, Judge, U.S. District Court for the Southern District of Ohio, sitting by designation.

1. Section 2929.04, Ohio Revised Code, (effective January 1, 1974, but subsequently amended). See also *Lockett v. Ohio,* 438 U.S. 586 (1978).

2. The Court found that Clark was mentally deficient and that the crime of murder was primarily produced by this deficiency. Jt. App. p. 5. R.C. 2903.01 and R.C. 2911.01.

This appeal from the District Court's dismissal of Clark's petition for habeas corpus under 28 U.S.C. Section 2254 presents important Fifth, Sixth, and Fourteenth Amendment questions. We believe the petition should not have been dismissed.

I. The Jury Instructions

A

Appellant's challenges to the instructions regarding aggravated murder were rejected by the Ohio courts, including the Supreme Court of Ohio, *State v. Clark,* 55 Ohio St.2d 257, 379 N.E.2d 597 (1978). Clark's petition for a writ of certiorari was denied by the United States Supreme Court. *Clark v. Ohio,* 440 U.S. 950 (1979).[3] For the reasons discussed below, we find that appellant's Due Process rights were violated by the jury instructions and accordingly reverse the judgment of the District Court.

The Supreme Court of Ohio summarized the facts developed during the course of Clark's trial as follows:

> On the morning of December 7, 1975, appellant, Jimmy Lee Clark, and a companion, Willie Jones, drove from Cuyahoga County to a gas station located just off Interstate 90 in Lake County. Upon their arrival the two men entered the gas station and confronted the attendant, Joseph H. Bradshaw, who was sitting on a stool in the front office. When Jones produced a handgun, Bradshaw reached into his pocket and gave Jones his money. Appellant and Jones then ordered Bradshaw back into the bay area of the gas station, where Bradshaw was made to lie on the floor while his coin and wallet were removed. Thereafter, appellant went into a back room and

3. Three Justices voted to grant the writ.

> removed some coins from a money box. Following this, Jones marched Bradshaw into the back room, from which appellant heard the sound of two gunshots as he was exiting the back room. Appellant and Jones then departed in their vehicle, and soon afterward Bradshaw was discovered lying dead, face down in the back room, with bullet wounds in the head and neck.[4]

The Court's charge, of course, has been reviewed in totality;[5] we find the following parts pertinent:

> Before you can find the Defendant guilty of aggravated murder you must find beyond a reasonable doubt that Joseph Bradshaw, Jr. was a living person; that his death was caused by the Defendant in Lake County, Ohio on or about the 7th day of December, 1975; that the killing was done purposely and that the killing was done while the Defendant was committing aggravated robbery.
>
> Purpose to cause the death of another is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. *It must be established in this case that at the time in*

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4. Clark argues that the Supreme Court of Ohio's summary of the facts is clearly wrong with respect to his location at the time of the actual shooting. As noted above, the Supreme Court wrote: "Jones marched Bradshaw into the back room, from which appellant heard the sound of two gunshots *as he was exiting the back room.*" (Emphasis added.) The record, however, suggests that Clark was either in the getaway car waiting for Jones when he heard the shots or was on his way to the car. Tr. 51-56. In any event, the precise location of Clark at the time the shots were fired is not significant and will accordingly play no part in the Court's review.

5. The trial court adequately charged on the presumption of innocence, burden of proof, and reasonable doubt as defined in R.C. 2901.05.

question there was present in the mind of the Defendant and/or his accomplice a specific intention to cause the death of Joseph H. Bradshaw, Jr.

An accomplice is a person who knowingly aids, abets, assists, encourages or directs or associates himself with another in the commission of a crime and he is regarded as if he were a principal offender and is just as guilty as if he personally performed every act constituting the offense. This is true even if such person was not physically present at the time the crime was committed. When two persons have a common purpose to commit a crime and one does one part and a second performs another, those acting together are equally guilty of the crime. Section 2923.03 of the Ohio Revised Code entitled Complicity reads in part as follows:

"No person acting with the kind of culpability required for the commission of an offense shall do any of the following: Aid or abet another in committing the offense."

Before you can find Jimmy Lee Clark guilty of aggravated murder in the first count of the indictment you must find beyond a reasonable doubt that he aided, abetted, assisted or encouraged another, Willie Jones, to purposely cause the death of Joe Bradshaw, Jr.

A person acts purposely when the jist of his offense is a prohibition against conduct of a certain nature regardless of what the offender intended to accomplish thereby. If it is his specific intention to engage in conduct of that nature he has a conscious objective of producing a specific result of engaging in specific conduct to do an act.

> Purpose is a decision of the mind to do an act with a conscious objective producing a specific result of engaging in specific conduct to do an act. Purposely is to do it intentionally and not accidently. Purpose and intention mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined by the manner in which it is done, the weapon used and all of the facts and circumstances that are presented to you in evidence.
>
> . . .
>
> While committing aggravated robbery means that the killing must have occurred as part of those acts leading up to or occurring during the commission of the aggravated robbery and that the killing was directly associated with the aggravated robbery. (Emphasis added.)

In addition to the charge on aggravated murder and aggravated robbery, the court instructed the jury to determine whether there was proof of one of the criteria for imposing the death penalty under RC 2929.04(7). The court stated:

> That separate question which you will be called upon to decide is, did the Defendant, Jimmy Lee Clark, purposely cause the death of Joseph Hiram Bradshaw, Jr., while committing aggravated robbery.

After the jury was charged and began deliberation, it requested the court to define aggravated murder and aiding and abetting. The elements of the crime and the complicity statute were again read to the jury.

It should be clearly understood that a review of the constitutional adequacy of jury instructions is far different from a review of the sufficiency of the evidence. Whether there is sufficient evidence to support a conviction for aggravated murder is a question that we need not answer.[6] Rather simply stated, our query is whether the jury charge considered as a whole advised a reasonable juror that the prosecution had the burden of proof of the essential elements of the crime of aggravated murder according to Ohio law. If the charge could have been interpreted by a reasonable juror to relieve the state of its burden to prove each of the essential elements, then Clark was denied the process that the constitution makes due. *Sandstrom v. Montana,* 442 U.S. 510, 517 (1978); *In re Winship,* 397 U.S. 358 (1970); *Burton v. Bergman,* 649 F.2d 428 (6th Cir. 1981).

B

Ohio has left the company of those jurisdictions which have traditional "felony murder" offenses. In such jurisdictions first-degree murder does not always require proof of an intent to kill. The underlying felony or predicate offense may serve as an intent-divining mechanism which compounded with a homicide supports a first degree or aggravated murder conviction. *See Whalen v. United States,* 445 U.S. 684, 713 (1980) (Rehnquist, J., dissenting).

Under Ohio law, however, purpose to kill is an essential element of the crime of aggravated murder.[7]

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6. In affirming the conviction, the Supreme Court of Ohio found the evidence sufficient but did not specifically address the jury instruction question. *State v. Clark,* 55 Ohio St.2d 257, 379 N.E.2d 597, *cert. denied,* 440 U.S. 950 (1979).

7. R.C. 2903.01 (B) and (C) provides:

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

State v. Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), *reversed on other grounds, sub nom. Lockett v. Ohio*, 438 U.S. 586 (1978); *State v. Clark*, 55 Ohio St.2d 257, 379 N.E.2d 597, *cert. denied*, 440 U.S. 950 (1979).

Both the Supreme Court of Ohio and the Court of Appeals affirmed Clark's convictions, citing *State v. Lockett, supra*. Paragraphs 3 and 4 of the syllabus of *Lockett* are as follows:

> 3. Where the record in a prosecution for aggravated murder committed during the commission of an armed robbery establishes that the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill.[8]

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8. The case at bar does not require us to consider any constitutional question that may be presented by the "presumption" suggested by the third paragraph of the *Lockett* syllabus. *Lockett* could be read as establishing a mandatory presumption regarding intent in murder cases involving aiders and abetters; but, the Supreme Court of Ohio has suggested in a subsequent opinion that the *Lockett* syllabus described only a factual basis from which the jury could *infer* a purpose to kill. *State v. Scott*, 61 Ohio St.2d 155, 379 N.E.2d 597 (1978). The trial court in this case did not utilize the *Lockett-Scott* inference in its instructions to the jury. Mr. Justice White alluded to the problem in his concurring opinion in *Lockett v. Ohio*, 438 U.S. 586, 627-28 (1978) when he wrote in the context of his views on the death penalty:

> Of course, the facts of both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims. But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in

> 4. If a conspired robbery, and the manner of its accomplishment, would be reasonably likely to produce death, each person engaged in the common design to commit the robbery is guilty with the principal killer as an aider and abetter in the homicide although not actually present at the time of the homicide, and a purposeful intent to kill by the aider and abetter may be found to exist beyond a reasonable doubt under such circumstances.

In *State v. Scott*, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980), however, the Supreme Court of Ohio emphasized the importance of the element of purpose to kill in situations where a defendant is charged as an aider and abetter. In that case, Scott together with individuals named Moore and LeRoy, initiated a plot to kidnap and hold for ransom a prosperous business figure named Emoff. Emoff was later murdered. Scott was brought to trial, and after the jurors had begun deliberating, the jurors presented the trial court with the following question:

> According to the *law* if a defendant is guilty of of kidnapping and the victim is never released alive even though the defendant had no knowledge of nor participation in the murder, by reason of being implicated in the kidnapping is he also guilty of aiding and abetting the murder?

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criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done. See *United States v. United States Gypsum Co.* [438 U.S. 422 (1978)] Indeed, the type of conduct which Ohio would punish by death requires at most the degree of *mens rea* defined by the ALI Model Penal Code (1962) as recklessness: conduct undertaken with knowledge that death is likely to follow.

61 Ohio St.2d at 166, 400 N.E.2d at 383. The trial court answered that "[s]uch a defendant is also guilty of aiding and abetting the murder." Rejecting this implicit adoption of the strict felony murder rule, the Supreme Court of Ohio wrote:

> The trial court's affirmative answer would have been correct only if Ohio adhered to the strict felony murder rule. That is, appellant would be "guilty of aiding and abetting the murder * * * [soley] by reason of being implicated in the kidnapping * * *" only if the *mens rea* requirement for murder could be supplied by the mental element of the underlying kidnapping.
>
> Ohio, however, does not follow the strict felony murder rule. "[P]urpose to kill is an essential element of the crime of first degree murder in this state." *State v. Lockett, supra* 49 Ohio St.2d at pages 58-59, 358 N.E.2d at page 1070; *Robbins v. State* (1857), 8 Ohio St. 131; *State v. Farmer* (1951), 156 Ohio St. 214, 102 N.E.2d 11. Accordingly, paragraphs three and four of the syllabus in *Lockett* describe the factual basis from which a jury could *infer* appellant's purpose to kill, as required by the aggravated murder statute. See Part VII, *supra.* See also, *State v. Johnson* (1978), 56 Ohio St.2d 35, 38, 381 N.E.2d 637. In effect, the trial court's affirmative answer to the jury question improperly relieved the state of its duty to prove appellant's purpose to kill beyond a reasonable doubt. See *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368.

Id.

Thus, under Ohio Law, a defendant's purpose to kill must be proved as an essential element of the crime

of aggravated murder even where the prosecution proceeds on an aider and abetter theory.[9] Certainly, purpose to kill may reasonably be inferred from proven facts, and a "non-triggerman" can be convicted under this statute.

C

The Due Process Clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [defendant] is charged." *In re Winship,* 397 U.S. 358, 364 (1970); *Sandstrom v. Montana,* 442 U.S. 510, 520 (1978). Thus, the question presented here, as in *Sandstrom,* is "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." 442 U.S. at 521. Under *Sandstrom, supra,* the test employed in reviewing jury instructions involving presumptions was described as follows:

> [The] determination requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction. *Id.* at 514 (Emphasis added.)

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9. R.C. 2923.03 provides:

> (A) No person, *acting with the kind of culpability required for the commission of an offense,* shall do any of the following:
>
> . . .
>
> (2) Aid or abet another, in committing the offense;
>
> . . .
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense. (Emphasis added.)

In contrast to *Sandstrom*, this case does not directly involve the use of a presumption as such. That is, the jury was never instructed that it must or might infer that the defendant had a purpose to kill based upon other facts in evidence. Instead, the jury in this case was instructed that the essential element of purpose to kill could be found in the mind of the defendant "and/or" his accomplice. Nevertheless, the principles articulated in *Sandstrom* are equally applicable here. Under *Sandstrom* principles we have no doubt that this isolated portion of the charge relieved the state of its burden to prove that Clark had a purpose to kill the victim.

Our task, however, does not end there. The magistrate's report, which was adopted by the District Court below, recognized the constitutional problem in the trial court's charge. However, the magistrate reasoned that the problematic portion of the charge "within the context of the overall instruction readily reveals that the jury was instructed that it must find petitioner had the purpose to kill if it was to find him guilty of aggravated murder." Jt. App. 27. We agree that a review of the complete charge is required. *Cupp v. Naughten*, 414 U.S. 141 (1973). We disagree with the magistrate's conclusions, however.

The portion of the charge on the elements of aggravated murder read as follows:

> Before you can find the Defendant guilty of aggravated murder you must find beyond a reasonable doubt
>
> [1] that Joseph Bradshaw, Jr. was a living person;
> [2] that his death was caused *by the defendant* in Lake County, Ohio on or about the 7th day of December, 1975;
> [3] that the killing was done purposely;
> [4] and that the killing was done *while the defendant* was committing aggravated robbery.

Conspicuously absent from number [3] above was a requirement that the killing was done purposely *by the defendant.*

Next, the jury was instructed that "it must be established that at the time in question there was present in the mind of the defendant and/or his accomplice a specific intention to cause the death." After a very general definition of the term "accomplice," the court read R.C. 2923.03 in part as follows: "No person acting with the kind of culpability required for the commission of an offense shall do any of the following: aid or abet another in committing the offense." Next, the court stated in effect that if Clark aided or abetted Jones to purposely cause the death of the victim he could be convicted of aggravated murder. Nowhere does the court make clear that Clark's "culpability" or mental state cannot automatically be that of Jones. The jurors were never told that Clark's culpability, whether established by direct proofs or by the *Lockett-Scott* inference must be first established before he can be an aider or abetter or an accomplice to aggravated murder.

Finally, the trial court instructed the jury concerning one of the criteria for the imposition of the death penalty under R.C. 2929.04(7). The court explained:

> That separate question which you will be called upon to decide is, did the Defendant, Jimmy Lee Clark, purposely cause the death of [the victim]. . . .

This is the only portion of the entire charge which specifically required a finding of purpose to kill on the part of Clark. We believe, however, that an instruction requiring purpose to kill on the "separate question" of penalty did not cure the ambiguities on the basic aggravated murder charge discussed above.

If the trial judge was attempting to charge based on the law of *Lockett,* the mark was missed. The essential ingredients of the *Lockett* mechanism for the inference of purpose to kill were not provided to the jury. That is, the jury was never told that it might infer Clark's purpose to kill if "the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed. . . ."[10] *Lockett v. Ohio, supra.* While we commiserate with the plight of an Ohio trial judge faced with the difficulty in charging a jury on aggravated murder under Ohio law, it is not impossible.

Upon review of the entire charge, we are convinced that the words "actually spoken to the jury," *Sandstrom, supra,* at 514, could have been interpreted by a reasonable juror in an improper manner. The charge could easily have been interpreted to mean that Clark, personally, did not have to have purpose to kill, and that Jones' purpose was sufficient to convict Clark, even if not shared by Clark.

We are also convinced that the erroneous jury instruction was not harmless error. In *Burton v. Bergman,* 649 F.2d 428 (6th Cir. 1981), Burton was convicted in a Michigan state court of assault with intent to commit murder. At trial, the Court instructed the jury that "the law presumes that any ordinary human being intends the ordinary consequences of his or her acts." *Id.* F.2d at 430. Applying *Sandstrom,* this Court concluded that "the trial court's instructions created a substantial risk that the jury would believe the presumption provided the necessary proof of petitioner's intent beyond a reasonable doubt." *Id.* F.2d at 431. We also rejected the respondent's argument that the erroneous instruction was harmless. Here,

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10. As noted above, our decision today does not require us to pass upon the presumption or inference suggested by *Lockett.* See note 8, *supra.*

as in *Burton,* the inference that Clark had the purpose to kill the gas station attendant was "by no means inescapable." *Id.* at 432. We accordingly conclude, consistent with *Burton,* that "[i]f the trial court had refrained from giving the improper instruction, the jury might have entertained a reasonable doubt [that Clark had a purpose to kill the victim]. Such an error cannot be harmless." *Id.*

Our decision is a narrow one. Again, we do not suggest that there was insufficient evidence in the record from which the jury could permissibly infer that Clark had a purpose to kill the victim. We hold only that where purpose to kill is an essential element of the crime of aggravated murder, a jury instruction permitting that element of culpability to be found in either the defendant or his accomplice is violative of the principles of Due Process under the Fourteenth Amendment.

II. Clark's Statements to Police

A

Clark made a total of four incriminating oral statements to Willoughby, Ohio, police officers. The first and second statements were made at a Cleveland, Ohio, police station. The third statement was made at the Arco gas station where the robbery and murder took place. The fourth statement was made at the Willoughby police station. After granting defendant-appellant's pretrial motion to suppress the second and third statements, the state trial court admitted into evidence the first and fourth statements. At the hearing on the motion to suppress, the facts surrounding Clark's statements to the police were developed. However, noticeably absent from the record are many findings of fact or analysis of the applicable law.

We conclude that this absence of fact finding coupled with our doubt as to whether the state trial court used the proper legal standards of waiver requires remand for further proceedings by the District Court.

B

The following facts are evident in the record.[11] Clark was arrested by Cleveland police officers on December 12, 1975, at approximately 8:00 a.m. on an aggravated robbery charge which was unrelated to the crimes for which Clark was convicted below. At the time of his arrest, Robert Tonne, a Cleveland police officer, allegedly gave Clark the *Miranda* warnings. Clark testified that he was not given his rights when arrested, but was later given the rights at the police station. Clark apparently made no statements on the day of his arrest.

On the morning of the next day, December 13, 1975, Clark was interrogated by Cleveland police officers Tonne and Gibbons. Tonne testified that Gibbons gave Clark the required *Miranda* warnings prior to questioning. Clark testified that he was not given his rights but he asked for an attorney. Clark said he knew nothing about the robbery for which he had been arrested and did not wish to talk to the officers.[12] Clark was then returned to his cell block.

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11. In the following discussion, certain facts are evident in the testmony of the police officers. In many instances, Clark's testimony conflicts with that of the officers. This description of the facts is not meant to bind the District Court in its treatment of the facts on remand.

12. Cleveland police officer Gibbons stated as follows: (Tr. 102-103)
Q. Did you ask him if he wished to talk to you?
A. Yes.
Q. And what was his response?
A. He didn't want to talk to us.

The Cleveland police officers, Tonne and Gibbons, went to the scientific investigation unit where they "bumped into" Willoughby police officers Collins, Reeves and Eisele. The Cleveland officers learned that one of Clark's fingerprints had been found on a cash box at the scene of the homicide for which Clark was eventually convicted. The Cleveland officers then returned to the fourth floor and again requested that Clark be brought out of his cell. Clark was confronted with the matching photographs of his fingerprints taken from his Cleveland police files and the scene of the crime. In addition, a Willoughby Municipal Court arrest warrant for aggravated murder was read to him. Clark stated that he "wanted to talk to the Willoughby police officers" who were downstairs in the criminal investigation unit. The Willoughby officers, Collins and Reeves, were sent for and thereafter entered the interrogation room. The Cleveland officers left the room.

Collins testified that he began advising Clark of his rights and Clark stated that he knew them. Collins nevertheless continued to advise Clark of his rights. Clark agrees that his rights were read to him at this point. According to the officers, Clark responded that he understood, that he wanted to cooperate, and that he wanted to make a statement. The officers claim that Clark said he wouldn't make a written or taped statement, but he was willing to talk about what had taken place. Thereafter, according to Detective Reeves of the Willoughby Police Department, Clark made a statement implicating himself in the robbery of the Arco station. Clark denied that he made a statement. This statement was related to the jury at trial by Detective Reeves. At the conclusion of Clark's statement to the Willoughby police, Clark was again asked if he wanted to put the statement on tape or make a written statement. Clark responded that he did not and requested an attorney. At that point, all questioning of Clark ceased, and according to Detective Collins, Clark was taken back to his cell block.

Detective Eisele's testimony reveals a slightly different version of the facts. Eisele apparently was not present when Clark made the first oral statement, and he testified that when he entered the room Collins requested that the warrant be read and explained to Clark. Eisele read the warrant. Clark asked, "Well, what does that mean?" He was told that he was charged with a capital offense. Clark also asked about the fingerprints, "How can I be sure they are mine?" He was told one was removed from a cash box at the crime scene. According to Eisele, after this conversation Clark was returned to a cell.

Collins and Eisele then went to the jail office and arranged to transport Clark to Willoughby. About 15 minutes later they were given custody of Clark, who, according to the officers, then stated that he wanted to make a statement and cooperate. Reeves and Eisele waited with Clark in the hallway while efforts were made to obtain a "statement room." During this wait, Eisele had conversation with Clark. Eisele claims that he reminded Clark of his rights, explained that he was not required to say anything, and asked what happened to the gun involved in the case. Eisele testified that Clark responded by describing the gun and where it was located. The trial court suppressed this second statement. Clark denied making a statement in the hallway.

A statement room then became available. Clark was again advised of his rights by the typist in the statement room. After being advised of his rights, Clark refused to sign a written waiver and again requested an attorney. Detective Tonne made efforts to obtain a public defender in the same building, but an attorney was not available. The questioning of Clark was terminated.

The Willoughby police then placed Clark in a vehicle for transportation to Willoughby. Reeves was the driver

and Eisele was in the passenger's seat. Sergeant Collins sat in the back next to Clark. Collins asked Clark if he would mind going to the Arco station on the way back to Willoughby. The officers testified that Clark was given *Miranda* warnings and thereafter he agreed to go to the Arco station. Clark testified that he told the officers that he didn't want to go to the station. Clark allegedly made a statement to the Willoughby police at the scene of the crime. The trial court ordered this third statement suppressed.

The fourth statement made by the defendant occurred at the Willoughby police station. Clark was given food and processed by the Willoughby police. Around 2:30 p.m. Clark was in the process of being removed from the cell block for his return to Cleveland. The officers claim that Clark told them that he wanted to make a statement and cooperate. Clark testified that they kept trying to get him to make a statement, but he kept asking for an attorney. Clark then executed a copy of the Willoughby police rights form which included an express waiver of the right to counsel.[13]

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13. VOLUNTARY STATEMENT – WAIVER OF RIGHT TO PRESENCE AND ADVICE OF A LAWYER FREE OF [COST TO] ME IF I AM INDIGENT.

Date 12-13-1975 TIME 2:30 PM PLACE Willoughby Police Dept.

I, Jimmie Lee Clark am 21 years of age, my address is 9713 Heath Avenue Cleveland, Ohio

I have been cautioned by Det. Laurence M. Reeves who has identified himselh as a WILLOUGHBY POLICE OFFICER, and who has warned me as follows:

WARNING

I am a police officer, I warn you that anything you say may be used in a Court of Law against you; That you have an absolute right to remain silent; That you have the right to the advice of a lawyer *before* and the presence of a lawyer here with you *during* questioning, and That, if you cannot afford a lawyer, one will be furnished for you free before any questioning if you desire.

I hereby state that I want to make a statement without a lawyer, that is to say, give up and do without the right to talk to a lawyer and ask his advice

According to the officers, after Clark had executed the waiver form, he began bargaining with the police. The police did not yet have the name of Clark's accomplice in the robbery and murder. Clark indicated his willingness to give the name of the accomplice provided he was given written guarantees that his cooperation would be explained to the court. Clark claims he signed the waiver after he was given the assurances. The police sought the assistance of their city prosecutor, Clifton Jones. The questioning of Clark was suspended until Jones arrived. When Jones arrived, Jones again advised Clark of his *Miranda* rights. A tape recorder recorded Jone's advice to Clark. Clark, however, insisted that the tape be turned off prior to making a statement, and Jones complied with the request. After the tape was turned off, Clark again made a statement concerning his involvement in the robbery and murder at the Arco gas station. When Clark was asked to reduce the statement to writing, he requested an attorney and Jones' questioning ceased. Detective Reeves testified to the substance of Clark's fourth statement at trial.

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before I make a statement, and also I wish to give up and do without having a lawyer present with me during the time when questions are asked me and during the time when I answer those questions. I am willing to make the following statement to the above person, knowing that any statement I make may be used against me in Court and that I have an absolute right to remain silent.

I declare that the following statement is made of my own free will and without anyone having promised me anything or offered out to me any hope of reward, and I make this statement without any fear of physical harm, without anyone having offered to do me any favor and without anyone promising me leniency.

I further state that I am able to read and write the English language and have completed . . . . . years of school.

SIGNED /s/ Jimmy Clark

WITNESSES /s/ Sgt. Clifford J. Collins
/s/ Det. Laurence M. Reeves

There was some testimony that Clark first attempted to sign the form with his left hand.

In addition to the above testimony, the trial court had before it evidence that Clark had been given the *Miranda* warnings on prior arrests. Moreover, in response to the trial court's question concerning why Clark had asked for an attorney, Clark responded: "Because I knew if I said—say anything it could be held against me, like—I guess they really wanted me to have no lawyer at the time."

C

As noted above, Clark made a total of four separate incriminating statements to the Willoughby police. Following a hearing on the defendant's motion to suppress, the trial court suppressed the second and third statements and held that the first and fourth statements were admissible at trial. The state trial court made no express findings of fact; nor did the court articulate what precise legal standard of waiver it was employing in analyzing the relevant facts. Moreover, there was no express finding by the state trial court that Clark's statements were made knowingly and voluntarily with an understanding of the rights thereby waived. The state trial court ruled as follows:

> Upon the Defendant's Motion to Suppress Statements made by him on four separate occasions to members of the Willoughby Police Department, as I previously stated, those statements made by him to Detective Eisele on the third floor of the Cleveland Police Station are suppressed. Those statements made by him to Detective Collins, and at the time I am speaking of, Detective Reeves and Detective Eisele might have been present, at the scene of the alleged crime, are suppressed. As to the remaining two

> instances, the first instance being on the fourth floor of the Cleveland Police Station, specifically in the sargent's [sic] office, the motion is denied; the second instance being in the Willoughby Police Department when Prosecutor Pat Jones was present; that motion is denied.

The opinion of the Court of Appeals of Lake County contains the following statement:

> [T]he record discloses that appellant gave the statements voluntarily after having been advised of his rights. Appellant's willingness to give an oral statement but not a taped or written statement is attributable to his desire to bargain for a reduced charge.

In ruling on the petition for habeas corpus, the district court attempted to reconstruct the facts found by the state courts:

> Although the trial court did not explicitly set forth its reasons for suppressing two of the statements and denying the motion to suppress the other two, it is apparent from the testimony that the two middle statements were suppressed by reason of petitioner's earlier request for an attorney, made initially after his first oral statement at the Cleveland police station. It is also apparent from the testimony that the court denied the motion to suppress the first oral statement on the basis that he had initially waived his *Miranda* rights and did not request an attorney until after his oral statement. It is equally apparent that the fourth oral statement, made in Willoughby, Ohio, on the afternoon of the same day, was not suppressed, despite earlier requests for an attorney, because that statement resulted from petitioner initiating the conversation by

voluntarily stating he wanted to cooperate and make a statement, rather than from petitioner being prodded to make a statement by the police.

This Court must first consider the relationship between the federal court's review of the factual record and the findings by the state courts.[14] Under normal

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14. 28 U.S.C. Section 2254(d) provides in pertinent part as follows:

(d) In any preceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately develcped at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

circumstances, the findings of the state courts[15] are entitled to a presumption of correctness and therefore considerable defences. The difficulty for the district court below and for this Court on review is the total absence of fact finding. The absence of fact finding by the state courts may require fact finding by the District Court.

In *Elliott v. Morford,* 557 F.2d 1228 (6th Cir. 1977), this Court was faced with a problem similar to this case. Elliott had been tried and convicted in the Tennessee state courts for the murder of a store proprietor. Prior to his trial, Elliott filed a motion to suppress his oral confession. Following a hearing, the trial judge denied the motion to suppress but made no findings of fact to resolve the conflict of testimony. After his conviction, Elliott sought habeas relief. Citing 28 U.S.C. Section

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And in an evidentiary hearing in the proceeding in the Federal Court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

15. The Supreme Court recently explained in *Sumner v. Mata,* 449 U.S. 539 (1981) that the federal habeas court must defer under Section 2254(d) to the factual findings not only of the state trial court, but also to any factual findings of state appellate courts. The state appellate court's finding of voluntariness in this case was not a finding of historical fact binding this Court under Section 2254(d), but was, instead, a determination of an issue of federal law. *Brewer v. Williams,* 430 U.S. 387, 403 (1977). Section 2254(d) does not preclude a federal court from reviewing "a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." *Cuyler v. Sullivan,* 446 U.S. 335, 342 (1980).

2254(d), the district court concluded that the state court's decision was presumed to be correct and that an evidentiary hearing was therefore not required. The Sixth Circuit concluded that the absence of fact finding by the state courts required remand for a hearing in the District Court.

The Fifth Circuit approach to this problem was recently explained in *Harris v. Oliver,* 645 F.2d 327, 330 (5th Cir. 1981).

> If purely historical facts are found which are uncontaminated by legal error, the federal court may rely on such state findings. Even if no express findings are made it may still be possible for the federal court to rely on facts impliedly found provided that the constitutional claim was decided on the merits. *Townsend* [*v. Sain,* 327 U.S. 293 (1963)] recognizes, however, that this inference of factual findings is impossible where the state court has used an incorrect legal standard:
>
> > Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. 372 U.S. at 314.
>
> . . .
>
> Of course, under *Rogers v. Richmond,* [365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961)],

> a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law. However, there will be situations in which statements of the trier of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary.

Id. at 315 n.10.

In this case, the state courts apparently applied a voluntariness standard in addressing Clark's contentions under both the Fifth and the Sixth Amendments. As noted above, the state trial court never expressly articulated what legal standard it was using, but the state appellate court found that the statement was voluntarily made.

We believe the state court's apparent use of a voluntariness standard, without more, creates doubt as to whether the trial court correctly utilized the legal standards for waiver of constitutional rights under the Fifth and Sixth Amendments. In *Edwards v. Arizona,* 451 U.S. 477 (1981), the Court was called upon to determine whether a defendant had waived his Fifth Amendment right to the presence of counsel. The Court explained:

> First, the Arizona Supreme Corut applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which

> depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). See *Faretta v. California,* 422 U.S. 806, 835 (1975); *North Carolina v. Butler,* 411 U.S. 369, 374-375 (1979); *Brewer v. Williams,* 430 U.S. 387, 404 (1977); *Fare v. Michael C.,* 442 U.S. 707, 724-725 (1979).
>
> Considering the proceedings in the state courts in the light of this standard, we note that in denying petitioner's motion to suppress, the trial court found the admission to have been "voluntary," App. 3, 95, without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel.
>
> . . .
>
> Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Id. at 482-84.

In the case at bar, we cannot glean from the silent state court record whether the trial court believed or disbelieved Clark's assertion that he had requested an attorney when first questioned by the police. If Clark did make such a request, *Edwards* requires that court to focus on whether Clark "understood his right to counsel and intelligently and knowingly relinquished it." *Id.*

Clark also contends that his Sixth Amendment right to counsel had accrued. None of the courts below have considered this claim. If Clark's right to counsel had accrued[16] at the time of his first statement to police, waiver of that right must be judged by a high standard. The Supreme Court in *Brewer v. Williams*, 430 U.S. 387, 404 (1977) stated:

> [I]t was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S., at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, *Carnley v. Cochran*, 369 U.S. 506, 513; *cf. Miranda v. Arizona*, 384 U.S., at 471, and that courts indulge in every reasonable presump-

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16. In view of the lack of fact finding pertinent to the question of whether Clark had been formally charged within the meaning of *Kirby v. Illinois*, 406 U.S. 682 (1972), we intimate no view on this issue. This Court has not yet decided what constitutes a formal charge. In *Holland v. Perini*, 512 F.2d 99, 103 n.1 (6th Cir. 1975), the Court expressly reserved the question of whether an arrest warrant was sufficient to trigger the Sixth Amendment right to counsel. Other courts have reached different conclusions on this question. *United States, ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) (issuance of arrest warrant under New York law is sufficient to trigger Sixth Amendment right to counsel); *cf. United States v. Duvall*, 537 F.2d 15 (2d Cir. 1976) (filing of complaint pursuant to Fed. R. Crim. P. 3 and arrest warrant does not trigger Sixth Amendment right to counsel); *United States, ex rel. Burton v. Cuyler*, 439 F. Supp. 1173 (E.D. Pa. 1977) (citing *Zelker, supra*, issuance of arrest warrant under Pennsylvania law is sufficient to trigger Sixth Amendment right to counsel); *cf. Lomax v. Alabama*, 629 F.2d 413, 416 (5th Cir. 1980) (issuance of an arrest warrant under Alabama law, absent significant prosecutorial involvement in procuring the warrant, is *not* sufficient to trigger the Sixth Amendment right to counsel). The record in this case does suggest some prosecutorial involvement in obtaining the arrest warrant on the aggravated murder charge. Tr. Vol. I, p. 24. The record before us, however, does not reflect precisely what prosecutorial involvement occurred prior to obtaining the arrest warrant. In order to properly address Clark's Sixth Amendment claim, the District Court may need to hear further evidence on the level of prosecutorial involvement in obtaining Clark's arrest warrant.

> tion against waiver, *e.g., Brookhart v. Janis, supra,* at 4; *Glasser v. United States,* 315 U.S. 60, 70. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pre-trial proceedings. *Schneckloth v. Bustamonte,* 412 U.S. 218, 238-240; *United States v. Wade,* 388 U.S. at 237.

Elaborating on this standard of waiver, the *Brewer* court further explained, "[W]aiver requires not merely comprehension but relinquishment . . . ." *Id.*

In short, the state court's use of a voluntariness standard raises doubt concerning the application of correct legal standards. We therefore conclude consistent with the Fifth Circuit's analysis in *Harris v. Oliver, supra,* at 330, that reconstruction of the facts found by the state courts is impossible and that an evidentiary hearing in the district court is required. This approach is consistent with the Supreme Court's seminal decision in *Townsend v. Sain,* 372 U.S. 293, 315 (1963): "[T]here will be situations in which statements of the trier of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary." *See also Pierce v. Cardwell,* 572 F.2d 1339 (9th Cir. 1978).

We fully recognize the principles of comity reflected in the habeas court's obligation to reconstruct the facts impliedly found by the state courts, where such reconstruction is reasonable. We are firmly convinced, however, that on the record before us such reconstruction would be pure speculation. Our jealous respect for important constitutional rights may not be premised on a system of speculative fact finding particularly where, as here, subtle nuances in the facts can have such far-reaching effects.

Because this case must be remanded to the District Court for fact finding, we believe it is expedient to identify other factual issues warranting consideration. When Clark was first questioned by Cleveland police regarding the Cleveland robbery on December 13, 1975, he asserted his right to remain silent under *Miranda, supra.* The Cleveland officers, Tonne and Gibbons, left the room and Clark was returned to his cell. Very soon thereafter, upon learning that Willoughby police had a warrant for aggravated murder for Clark, the Cleveland officers retrieved Clark from his cell and brought him back to the room for futher questioning. An issue somewhat similar to that before the Supreme Court in *Michigan v. Mosley,* 423 U.S. 96 (1975), is presented. In *Mosley,* the defendant was arrested in connection with certain robberies, was given *Miranda* warnings, and elected to remain silent. The police ceased questioning. Over two hours later, a different police officer questioned Mosley at another location about an unrelated holdup murder. He was given fresh *Miranda* warnings and elected to make a statement. The Supreme Court held that the admission of Mosley's statement did not violate his *Miranda* right to cut off questioning. In this case, the district Court on remand should consider the effect, if any, of the relatively short period of time between the cessation of the first questioning and the second meeting with the same Cleveland police officers, albeit concerning different charges. The District Court should also consider other factual distinctions between this case and *Mosley.* Moreover, in the event Clark did invoke his right to remain silent, was his oral statement made thereafter of his own initiative, or was he interrogated? See *Rhode Island v. Innis,* 446 U.S. 291 (1980). We emphasize that we intimate no view concerning the significance of these factors on the District Court's determination on remand.

Although we believe the proper determination of the admissibility of the first statement is a key threshold decision, even if it is deemed to have been unconstitutionally obtained, Clark's fourth statement may be admissible under certain circumstances. If the District Court finds that the fourth statement was a product of Clark's initiative and given without interrogation, it may be admissible. See *Edwards v. Arizona, supra.* However, the psychological effect, if any, on Clark after having made the first statement also is significant in determining the lawfulness of the fourth statement. After an accused has let the cat out of the bag by confession, no matter what the inducement, he may not thereafter be free of the psychological and practical disadvantages of having confessed. *United States v. Bayer,* 331 U.S. 532, 540-541 (1947); *Maglio v. Jago,* 580 F.2d 202 (6th Cir. 1978).

On remand, the District Court must also consider the impact, if any, of the police course of conduct throughout the day prior to Clark's alleged initiation of the fourth statement to police. Finally, the District Court should consider the appellant's age, education, mental state, and all other well-known criteria relevant to the determination of intent and volition to waive constitutional rights. *Fare v. Michael C.,* 442 U.S. 707, 724-725 (1979); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

There is, of course, evidence in the record which may lead the district Court to the conclusion that waiver of both the Sixth Amendment right to counsel and *Miranda* rights was established. Clark's refusal to sign a written waiver does not preclude a finding of waiver. *North Carolina v. Butler,* 441 U.S. 369, 375 n.5 (1979) (and cases cited therein).

We remand this case with reluctance with full respect for our obligation to deter to the findings of the

state courts. On this record, however, there are simply no findings to which we can defer and substantial uncertainty that the correct legal standards were used. Moreover, neither the state courts nor the court below have expressly considered whether the appellant's Sixth Amendment right to counsel had accrued.

III. The Double Jeopardy Claim

Appellant's final claim is that his right to be free from double jeopardy under the Fourteenth Amendment has been violated by his consecutive sentences on the aggravated robbery and aggravated murder convictions. Clark was sentenced to a term of life imprisonment for the crime of aggravated murder and to a term of from seven (7) to twenty-five (25) years imprisonment for the crime of aggravated robbery. He contends that this amounts to multiple punishment for the same crime.

In view of the Court's disposition of the appellant's claim concerning the aggravated murder conviction, the appellant may not be incarcerated on the aggravated murder conviction unless the state elects to retry him. Appellant's claim of double jeopardy is therefore moot. If petitioner is convicted again on the aggravated murder charge, the state court will have an opportunity to consider appellant's double jeopardy claim in light of *Whalen v. United States,* 445 U.S. 684 (1980) prior to sentencing. We intimate no view on the merits of appellant's double jeopardy claim.

CONCLUSION

The District Court is directed to order that Clark be released from custody on the aggravated murder conviction unless Ohio chooses to retry him within a reasonable time to be determined by the District Court.

Clark is also in custody on his conviction for aggravated robbery. The District Court is directed to hold an evidentiary hearing on the question of whether appellant's statements to police were constitutionally admissible. Clark will remain incarcerated during the period of the evidentiary hearing pending the District Court's decision. If Clark's statements to police were not constitutionally admissible, the District Court must grant the writ as to the aggravated robbery conviction as well.

Accordingly, the judgment of the District Court is reversed and the case is remanded.

No. 81-3042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIMMY LEE CLARK,
Plaintiff-Appellant

v.

ARNOLD R. JAGO,
Defendant-Appellee

ORDER

FILED September 13, 1982

Before: KEITH and MARTIN, Circuit Judges; DUCAN, District Judge.*

Appellant has moved the court for a rehearing of the above-captioned appeal, with a suggestion for rehearing en banc. No judge in active service having favored a rehearing en banc, the motion is referred to the panel which heard the appeal.

Upon consideration of the petition for rehearing, we are of the opinion that the various contentions of the appellee were adequately treated in our previous Order, and that said petition for rehearing should be and it hereby is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

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*The Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jimmy Lee Clark
Petitioner

v.

Ronald C. Marshall, etc.
Respondent

Civil Action

Number C80-110

ORDER

FILED December 10, 1980

The court has examined the report and recommended decision of the magistrate submitted in this case. No comment having been received thereon, upon due consideration the court adopts the magistrate's recommended findings and conclusions, therefore,

IT IS ORDERED that the petition for a writ of habeas corpus is hereby denied.

/s/ signature deleted
ANN ALDRICH, U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JIMMY LEE CLARK,
Petitioner,

v.

RONALD C. MARSHALL,
SUPERINTENDENT,
Respondent

CASE NO. C80-110

JUDGE ANN ALDRICH

REPORT AND RECOMMENDED
DECISION OF MAGISTRATE

STREEPY, MAG.

Mr. Jimmy Lee Clark, petitioner herein, was tried and found guilty on March 22, 1976, of aggravated murder, with a death penalty specification, in violation of Ohio Rev. Code Section 2903.01, and of aggravated robbery in violation of Ohio Rev. Code Section 2911.01. On May 19, 1976, he was sentenced to a term of life imprisonment for the aggravated murder and to a term of seven to twenty-five years imprisonment for the aggravated robbery, with the sentences to be served consecutively. Mr. Clark's appeal to the Court of Appeals and to the Ohio Supreme Court was unsuccessful.

The basic details concerning the aggravated robbery and murder were set forth by the Ohio Supreme Court in *State v. Clark,* 55 Ohio St.2d 257, 257-258 (1978), *cert. denied* 440 U.S. 950 as follows:

> On the morning of December 7, 1975, appellant, Jimmy Lee Clark, and a companion, Willie Jones, drove from Cuyahoga County to a gas station located just off Interstate 90 in Lake County. Upon their arrival the two men entered the gas station and confronted the attendant, Joseph H. Bradshaw, who was sitting on a stool in the front office. When Jones produced a handgun, Bradshaw reached into his pocket and gave Jones his money. Appellant and Jones then ordered Bradshaw back into the bay area of the gas station, where Bradshaw was made to lie on the floor while his coin changer and wallet were removed. Thereafter, appellant went into a back room and removed some coins from a money box. Following this, Jones marched Bradshaw into the back room, from which appellant heard the sound of two gunshots as he was exiting the back room. Appellant and Jones then departed in their vehicle, and soon afterward Bradshaw was discovered lying dead, face down in the back room, with bullet wounds in the head and neck.

Mr. Clark has alleged three grounds in his petition. Respondent does not contend he has failed to exhaust state remedies with reference to the first two grounds, but has raised a related issue with reference to the third ground, which issue will be considered when that ground is discussed.

I

Peitioner contends his right to due process was violated by reason of the jury instructions in his case.

Petitioner bases his claim upon the following portion of the instructions (Transcript, Vol. 4, pp. 390-391):

> It must be established in this case that at the time in question there was present in the mind of the defendant and/or his accomplice a specific intention to cause the death of Joseph H. Bradshaw, Jr.

Petitioner contends this instruction made it possible to convict him on no evidence that he possessed a purpose to kill since it allegedly informed the jury that it was sufficient if the accomplice had a purpose to kill.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; *Sandstrom v. Montana,* _____U.S. _____, 47 U.S.L.W. 4719 (1979); *In re Winship,* 397 U.S. 358 (1970). An essential element of the crime of aggravated murder in Ohio is an intent or purpose to kill, *State v. Clark, supra; State v. Lockett,* 49 Ohio St.2d 48 (1976), *aff'd on other grounds,* 438 U.S. 586 (1978). Accordingly, due process required that the court instruct the jury that to convict Mr. Clark of aggravated murder it must, among other elements, find that he possessed an intention or purpose to kill. In determining whether the jury was correctly instructed as to the element of purpose a single instruction to the jury may not be judged in artifical isolation, rather it must be viewed within the context of the overall charge, *Cupp v. Naughten,* 414 U.S. 141 (1973).

During the course of its instructions the court informed the jury that petitioner was presumed to be innocent (T, Vol. 4, p. 383). The court subsequently instructed the jury (T 390):

> Before you can find the Defendant guilty of aggravated murder you must find beyond a reasonable doubt that Joseph Bradshaw, Jr. was a living person; that his death was caused by the Defendant in Lake County, Ohio on or about the 7th day of December, 1975; that the killing was done purposely and that the killing was done while the Defendant was committing aggravated robbery.

The court then defined purpose, wherein was inserted the sentence emphasized herein by the petitioner (T 390-391). The court then defined an accomplice and further noted in part that, "When two persons have a common purpose to commit a crime and one does one part and a second performs another, those acting together are equally guilty of the crime." (T 391). The court quoted Ohio Rev. Code Section 2923.03 for the jury as follows (*id.*):

> No person acting with the kind of culpability required for the commission of an offense shall do any of the following: Aid or abet another in committing the offense.

The court then instructed (T 391):

> Before you can find Jimmy Lee Clark guilty of aggravated murder in the first count of the indictment you must find beyond a reasonable doubt that he aided, abetted, assisted or encouraged another, Willie Jones, to purposely cause the death of Joe Bradshaw, Jr.

The charge of aggravated murder against petitioner also had a specification that he committed the crime

while also committing aggravated robbery. The court instructed the jury that the issue surrounding the specification raised a separate question. As noted by the court (T 394), "That separate question which you will be called upon to decide is, did the Defendant, Jimmy Lee Clark, purposely cause the death of Joseph Hiram Bradshaw, Jr., while committing aggravated robbery." (T 393) The court then informed the jury that a finding a guilty on this question "must be proved beyond a reasonable doubt" (*id.*).

When the one sentence portion of the charge quoted by petitioner is viewed in isolation use of the word "or" within the phrase "and/or" would potentially focus attention of the jury only on whether petitioner's accomplice had a purpose to kill. However, this sentence was not prefaced by an instruction as to what elements the state had to prove beyond a reasonable doubt. Consideration of this isolated sentence within the context of the overall instructions readily reveals that the jury was instructed that it must find petitioner had the purpose to kill if it was to find him guilty of aggravated murder.

Petitioner also argues that the one sentence he quoted created a presumption that he had the necessary purpose or intent to kill, thus shifting the burden to him to disprove same. The Fourteenth Amendment prohibits a state from shifting to the defendant the burden of disproving an element of the crime charged, *Sandstrom, supra; Mullaney v. Wilbur,* 421 U.S. 684 (1975). However, the instructions do not contain language which shifted the burden to the petitioner. Rather, petitioner's argument is confined by the facts to whether the instructions properly informed the jury that it had to find beyond a reasonable doubt that petitioner had a purpose to kill. As noted earlier, the instructions did so inform the jury.

II

For his second ground petitioner contends his conviction was based upon involuntary statements he made to the police. Prior to trial petitioner filed a motion to suppress any statements. The court conducted an evidentiary hearing (*see* Transcript, Vols. 1 & 2), found that petitioner made four oral statements, denied the motion as to two of the statements, and ordered that the other two be suppressed.

The first statement was made on the morning of December 13, 1975, at the central police station in the City of Cleveland (*see* Transcript, Vol. 3, pp. 249-254, 260-262). Petitioner's fourth oral statement (the second statement admitted into evidence) was made on the afternoon of the same day in a police station in the City of Willoughby, Ohio (Transcript, Vol. 3, pp. 263-265, 294-296).

The testimony at the suppression hearing (that testimony which was obviously credited by the court) established that on the morning of December 13, after being advised of his *Miranda* rights, petitioner waived his rights and made an oral statement; however, when asked to reduce his statement to writing he asked for an attorney. The interrogation immediately ceased.

Subsequently petitioner was questioned on two separate occasions, at which he gave further oral statements. These statements were made later in the day on December 13, and both were ordered suppressed.

Eventually petitioner was transferred from Cleveland to Willoughby, Ohio, (where the murder had occurred) for the purpose of processing. It had been agreed between the respective police departments that he would then be returned to the City of Cleveland, where he had initially been arrested by Cleveland police officers in relation to an unrelated charge.

After petitioner was processed in Willoughby, Ohio, the police made preparations to transport him back to Cleveland. At this time the defendant, without being asked any questions, voluntarily stated that he wished to cooperate and make a further statement. He thereafter signed a waiver of his *Miranda* rights (Transcript, Vol. 1, Ex. 2). Moreover, a prosecuting attorney was called, who advised him a second time of his *Miranda* rights (*Id.*, Defendant's Ex. A). A short preliminary conversation between petitioner and the attorney was tape-recorded, but at petitioner's request it was turned off prior to making any statement. Thereafter petitioner made an oral statement, shortly after 3:30 p.m. on the afternoon of December 13, 1975, to the Willoughby police officers and prosecuting attorney. He was then asked if he would agree to placing his oral statement on tape or in writing, to which he responded in the negative and stated he desired an attorney. At that time the questioning ceased and the prosecuting attorney made the necessary arrangements to obtain a defense attorney.

Although the trial court did not explicitly set forth its reasons for suppressing two of the statements and denying the motion to suppress the other two, it is apparent from the testimony that the two middle statements were suppressed by reason of petitioner's earlier request for an attorney, made initially after his first oral statement at the Cleveland police station. It is also apparent from the testimony that the court denied the motion to suppress the first oral statement on the basis that the had initially waived his *Miranda* rights and did not request an attorney until after his oral statement. It is equally apparent that the fourth oral statement, made in Willoughby, Ohio, on the afternoon of the same day, was not suppressed, despite earlier requests for an attorney, because that statement resulted from petitioner initiating the conversation by voluntarily stating he wanted to cooperate and make a statement, rather than from petitioner being prodded to make a statement by the police.

Petitioner is essentially restating allegations made in his state court motion to suppress. The state court hearing satisfied the Due Process Clause requirements set forth in *Jackson v. Denno,* 378 U.S. 368 (1964). Petitioner was represented by counsel throughout the hearing on his motion to suppress. He was able to testify on his own behalf, and no restraints were placed on the subject matter of his testimony.

Based upon the evidence and the rulings at the state hearing, the fact petitioner refused to have his initial oral statement taped or reduced to writing until after talking to an attorney did not negate the voluntariness of his earlier oral statement, *see Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849; *Hill v. Whealon,* 490 F.2d 629 (6th Cir. 1974). Under these circumstances his first oral statement was voluntarily made.

The second oral statement, made at the Willoughby, Ohio, police station in the afternoon of the same day, requires separate analysis. The right to have an attorney present during questioning is central to Fifth Amendment protection. Once the accused requests an attorney the state bears a heavy burden to show that the subsequently waived his right to the presence of an attorney, *Maglio v. Jago,* 580 F.2d 202 (6th Cir. 1978); *United States v. Nixon,* 571 F.2d 1121 (9th Cir. 1978). Indeed, *Maglio, supra,* indicates that the Supreme Court has strongly suggested a *per se* rule barring custodial interrogation of a suspect after a request for counsel has been made; however, *Maglio* did not actually reach the issue of whether a *per se* rule is required. Other courts which have reached that issue have overwhelmingly held there is no *per se* rule, *see White v. Finkbeiner,* 611 F.2d 186, 192 (7th Cir. 1979), and cases cited therein.

The general test for a waiver of an individual's constitutional rights is whether the government has

shown an intential relinquishment or abandonment of a known right or privilege, *White*. The factors which courts have considered to determine whether a prior request for counsel has been subsequently waived are the accused's background, experience, and conduct; whether the accused initiated the contact which led to the statement being made; the time delay between the original request for an attorney and subsequent interrogation; and the general circumstances surrounding the subsequent waiver, *see White; Maglio, supra.*

In the instant case it was the petitioner who initiated further communication with the police. His *Miranda* rights were reexplained, and he then signed a written waiver. He was informed of his *Miranda* rights still another time, by a prosecuting attorney, prior to making his oral statement. The prosecuting attorney suggested that prior to making a statement the petitioner "think about it" for awhile (Transcript, Vol. 1, Defendant's Ex. A). What occurred in petitioner's case comes close to the following comment in *Maglio, supra,* at p. 206:

> If the police had reexplained Maglio's rights and then withdrawn, allowing the boy to consider his alternatives, and he had then initiated further communication with the police, we would be able to find a waiver. . . .

Considering all the circumstances, most notably the fact that petitionier initiated the communication with the Willoughby police, his oral statement was made voluntarily.

Even assuming that admission of the second oral statement was constitutional error, there was otherwise such overwhelming evidence of guilt (particularly his first

oral statement, which was substantially the same as the second) to render admission of the second statement harmless error, *see Milton v. Wainwright,* 407 U.S. 371 (1972).

III

Petitioner's third ground is that his consecutive sentences for aggravated murder and aggravated robbery violate his right against double jeopardy. Petitioner did not raise this issue in his state court appeal. Respondent contends that he is thus barred from presenting this issue in a petition for a writ of habeas corpus, citing *Wainwright v. Sykes,* 433 U.S. 72 (1977) and *Francis v. Henderson,* 425 U.S. 536 (1976). In *Keener v. Ridenour,* 594 F.2d 581 (6th Cir. 1979) it was noted that if the state can show a prisoner "deliberately bypassed" state remedies or is precluded from raising his claim through "inexcusable procedural default" of a state rule or provision, federal habeas corpus relief is precluded, citing, among others, *Wainwright, supra* and *Francis, supra.* Apparently the state in *Keener, supra,* failed to make the necessary showing since *Keener* ruled that the petitioner therein had exhausted state remedies. In the instant case respondent has also failed to make any showing. Petitioner has exhausted his state remedies as to this issue.

Consideration of the issue on its merits demonstrates that it borders on the frivolous. Double jeopardy is involved only where there has been either multiple punishment for the same offense or successive prosecutions for the same offense, *see United States v. Wilson,* 420 U.S. 332 (1974); *North Carolina v. Pearce,* 395 U.S. 711 (1969). Successive prosecutions of either the same or different offenses are not involved herein, since petitioner was prosecuted only once for the crimes of

aggravated robbery and aggravated murder. His consecutive sentences for the two crimes did not represent multiple punishment for the same offense since the elements of aggravated murder under Ohio Rev. Code Section 2903.01(B) are not the same as the elements of aggravated robbery pursuant to Ohio Rev. Code Section 2911.01, thus they are not the same offense. Among other elements, aggravated murder requires proof that an individual was purposely killed by the accused. These elements are not present in aggravated robbery.

RECOMMENDATION

It is recommended that the petition for a writ of habeas corpus be denied.

Dated: Ocrober 30, 1980 /s/ signature deleted
Jack B. Streepy
United States Magistrate

Statement of the Case.

THE STATE OF OHIO, APPELLEE,
v. CLARK, APPELLANT.

[Cite as State v. Clark (1978), 55 Ohio St.2d 257.]

Criminal law—Aggravated murder—During commission of armed robbery—Purposeful intent to kill—Established, how.

Where the record in a prosecution for aggravated murder committed during the commission of an armed robbery established that the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill. (Paragraph three of the syllabus in *State v. Lockett*, 49 Ohio St.2d 48, approved and followed.)

(No. 77-909—Decided August 16, 1978.)

APPEAL from the Court of Appeals for Lake County.

On the morning of December 7, 1975, appellant, Jimmy Lee Clark, and a companion, Willie Jones, drove from Cuyahoga County to a gas station located just off Interstate 90 in Lake County. Upon their arrival the two men entered the gas station and confronted the attendant,

Joseph H. Bradshaw, who was sitting on a stool in the front office. When Jones produced a handgun, Bradshaw reached into his pocket and gave Jones his money. Appellant and Jones then ordered Bradshaw back into the bay area of the gas station, where Bradshaw was made to lie on the floor while his coin changer and wallet were removed. Thereafter, appellant went into a back room and removed some coins from a money box. Following this, Jones marched Bradshaw into the back room, from which appellant heard the sound of two gunshots as he was exiting the back room. Appellant and Jones then departed in their vehicle, and soon afterward Bradshaw was discovered lying dead, face down in the back room, with bullet wounds in the head and neck.

On December 31, 1975, the Lake County Grand Jury returned an indictment charging both appellant and Jones with one count of aggravated murder with a specification, and with one count of aggravated robbery. After a series of pre-trial motions appellant's trial began on March 9, 1976. The jury returned a verdict of guilty on all charges on March 22, 1976.

A mitigation hearing was held on May 19, 1976, at the close of which the court found that a mitigating circumstance had been established. Appellant was thereupon sentenced to life imprisonment on the first count and 7 to 25 years on the second count, with the two terms to run consecutively.

On appeal, the Court of Appeals affirmed the trial court's judgment.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. John E. Shoop, prosecuting attorney, *Mr. David L. Lavinder* and *Mr. Gregory C. Sasse,* for appellee.

Mr. Albert L. Purola and *Mr. John Winthrop Ours*, for appellant.

CELEBREZZE, J. Appellant does not deny that he aided and abetted an aggravated robbery, but contests his conviction for the crime of aggravated murder, with the specification that the crime was committed during the commission of an aggravated robbery.

In order to comprehend the foundation of appellant's argument three statutes must be examined, the first of which, R. C. 2903.01(B), is the aggravated murder statute under which appellant was charged as an aider and abettor. This section provides:

"No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committign or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape."

The second statute is the complicity section, R. C. 2923.03, which reads in pertinent part:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"* * *

"(2) Aid or abet another in committing the offense."

The third statute is R. C. 2901.22(A), which defines the culpable mental state of purpose, as follows:

"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

In view of the above-quoted sections appellant contends that to convict him of the crime of aggravated murder with the particular specification, it was necessary for the state to prove that he possessed the specific intention to kill, and that specific intent to kill may not be presumed as being the natural, reasonable and probable consequence of engaging in an aggravated robbery.

Appellant's position is in direct opposition to the majority holding of this court in *State v. Lockett* (1976), 49 Ohio St. 2d 48, 58-62,* a case in which the facts were parallel to the facts in the cause at bar. Our examination of the record in the instant cause establishes that appellant participated in the planning and commission of the robbery, and also acquiesced in the employment of a deadly weapon to accomplish this crime. Under these circumstances appellant must have realized that the victim's life would be endangered by the manner and means of performing the act conspired, and accordingly, appellant is bound by the consequences naturally resulting from the furtherance of the conspiracy to commit the aggravated robbery. We therefore hold that the jury had before it sufficient evidence from which to find that appellant possessed a purposeful intent to kill.

The judgment of the Court of Appeals is hereby affirmed.

Judgment affirmed.

HERBERT, P. BROWN, SWEENEY and LOCHER, JJ., concur.

O'NEILL, C.J., and W. BROWN, J., concur in the judgment with regard to the conviction for aggravated robbery. *State v. Lockett* (1976), 49 Ohio St. 2d 48.

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*This issue was not resolved by the United States Supreme Court in its decision involving *Lockett v. Ohio* (1978), ___U.S.___, 57 L. Ed. 973.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this Entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ROBERT E. COOK
/s/ ALFRED E. DAHLING
/s/ EDWIN T. HOFSTETTER
Judges

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Dated May 31, 1977)

Case No. 6-017
COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
LAKE COUNTY

STATE OF OHIO,
Appellee,

vs

JIMMIE LEE CLARK,
Appellant.

OPINION

DAHLING, J.

This is an appeal from a judgment of the Court of Common Pleas of Lake County wherein after a trial by jury the defendant was found guilty of Aggravated Murder

in violation of Section 2903.01 with specifications of aggravated circumstances of Aggravated Robbery and the defendant was found guilty of Aggravated Robbery in violation of Section 2911.01. Defendant was sentenced to life imprisonment for Aggravated Murder and to seven to twenty-five years for Aggravated Robbery with the time to be served consecutively.

The defendant-appellant has presented the following Assignments of Error for review:

"1. The trial court erred in overruling the defendant's motion to suppress evidenc directed at the statements obtained at the Cleveland Police Station and the Willoughby Police Station.

2. The verdict is against the weight of the evidence and the judgment is contrary to law in that the evidence is insufficient to sustain the conviction of aggravated murder and the trial court erred in denying the appellant's motions for a judgment of acquittal.

3. The trial court erred in charging the jury on the law as it applies to complicity.

4. The trial court erred in denying the appellant's motion to dismiss the indictment for aggravated murder and the specification of an aggravating circumstance on the ground that the manner in which the penalty is determined pursuant to Revised Code Section 2929.03 has a chilling effect on the exercise of the right to trial by jury.

5. The trial court erred in denying appellant's motion to dismiss the specification of an aggravating circumstance and in denying appellant's motion for a judgment of acquittal on the ground that a specification of aggravated robbery is insufficient to

charge a capital offense where the principal offense also is stated in terms of the same aggravated robbery."

These Assignments of Error are without merit.

The first Assignment of Error is that certain statements of the defendant given at the Cleveland Police Station and Willoughby Police Station should have been suppressed. This Assignment of Error is without merit as the Record discloses that appellant gave the statements voluntarily after having been advised of his rights. Appellant's willingness to give an oral statement but not a taped or written statement is attributable to his desire to bargain for a reduced charge.

The Brief of Mr. Gregory Sasse, Assistant Prosecuting Attorney, succinctly summarized the appellant's motives and objectives in giving an oral statement:

"....

Without actually knowing what rule he sought to invoke he had probably become aware of technicalities which he knew had freed obviously guilty men and which had rationales which made no sense to him, and he wanted to hold the option open that he could benefit from such rule. Who is to say that appellant was mistaken? He has succeeded in his every objective. His accomplice has been caught, the death penalty has been avoided, and he has a shot at overturning his conviction which is based entirely upon the fact that he refused to put his statement on tape or in writing. To be sure, he may have misunderstood the extent to which he weakened his bargaining position by the making of his oral statement and by the waiving of his right to counsel, but then nobody is perfect."

The second Assignment of Error is answered by *State v. Lockett,* 43 Ohio St.2d 48 (1976) Syllabus 3 and 4, which state as follows:

> "3. Where the record in a prosecution for aggravated murder committed during the commission of an armed robbery establishes that the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill.
>
> 4. If a conspired robbery, and the manner of its accomplishment, would be reasonably likely to produce death, each person engaged in the common design to commit the robbery is guilty with the principal killer as an aider and abetter in the homicide although not actually present at the time of the homicide, and a purposeful intent to kill by the aider and abetter may be found to exist beyond a reasonable doubt under such circumstances."

The third Assignment of Error is similar to the second Assignment of Error Except that it concerns the Trial Court's "instructions to the jury" as it pertains to complicity.

In addition to *State v. Lockett, supra,* see *State v. Doty,* 94 Ohio St. 258 (1916) wherein the Court stated:

> "Where. . .[an] unlawful act was contemplated in the original conspiracy, although not identical with or similar to the criminal act charged, if the conspired

> unlawful act and the manner of its performance would be reasonably likely to produce death, each conspirator is equally guilty with the principal offender, as an aider and abetter in the homicide, although such aider and abettor was neither present nor had knowledge of the physical killing or of the weapon used."

We are of the opinion *State v. Doty* is still good law and the Trial Court did not err in instructing the jury on complicity.

The fourth Assignment of Error is that the manner in which the penalty is determined in R.C. 2929.03 has a chilling effect on the exercise of the right to trial by jury. The appellant chose to have a jury trial and was sentenced to life so this Assignment of Error is not pertinent to the case sub judice. However, the Court in *State v. Bell,* 48 Ohio St.2d 270 (1976), responded to this issue in Paragraph 1 of the Syllabus:

> "A defendant is not coerced or impelled to waive his constitutional right to a jury trial by R.C. 2909.03 [C] [1], [2], and [E], under the provisions of which an offender who waives jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty."

Appellant's final (fifth) Assignment of Error complains that the indictment stated both the principal offense and the specification of an aggravated circumstance in terms of the same aggravated robbery. Appellant's Reply Brief makes the astute observation that the death penalty is not provided for the cold-blooded, lying-in-wait killing. It can be argued that the lying-in-wait killing is more heinous than an accomplice to an armed robbery murder as in the instant case.

Also, the appellant makes the following commentary to support this Assignment of Error:

> "In this case and in every other indictment drawn like it there is no legal or logical possibility of a not guilty verdict on the specification since by the time the jury reached that question under R.C. 2929.03 [B] they would have already satisfied themselves beyond a reasonable doubt as to the factual issues presented by the specification. If the principal charge is robbery-murder and the specification is robbery-murder, based on the same robbery as here, by duplicating the same allegations and calling one a principal charge and one a specification, the prosecuting attorney has turned an offense that when written once is a life offense into a death offense by writing it twice.
>
> It is undeniable that no possibility exists for an acquittal on the specification and that fact alone rende. meaningless that part of the indictment.
>
> What Ohio prosecutors have been unable to fathom apparently is that robbery-murder cases are no longer capital crimes all by themselves. The popular consensus is that Ohio has retained the death penalty for certain felony murders and that is not the fact."

The appellant was sentenced to life imprisonment so the Motion to Dismiss the specification of the aggravated circumstance was not prejudicial. In addition, we agree with the following summary from the Brief of Mr. Sasse:

> "The crux of appellant's dissatisfaction lies with the fact that in his case the proof of one event, to-wit: the robbery, triggers two legal consequences, one regarding liability for murder and one regarding sentencing. Appellant is not *entitled*, as a matter

of law, to two factual determinations because there is no right to an equal opportunity to escape punishment for crimes which one has committed. There is nothing inherently unjust in the situation where one factual event brings about two legal results as regards criminal liability. For example, if a 17 year old and a 19 year old engage in petty theft, the 19 year old is also liable for contributing to the delinquency of a minor. Where the policy reasons appropriately fit the facts there is no injustice. A situation which would be unjust and arbitrary would be found if a lesser felony which is included in a homicide could be used via the felony-murder rule to elevate the homicide to the level of aggravated murder. However, such is not the case since the law requires that the elements of the felony differ from those elements which are included in the homicide charge for the felony-murder rule to apply.

In appellant's case no injustice has resulted from charging him with a specified aggravating circumstance of aggravated robbery when similar language was used in describing the principal charge.

The State of Ohio has followed the law and procedure as outlined and as intended by the legislature and should be required to do no more than that."

For the foregoing reasons the Assignments of Error of the appellant are found without merit and the judgment is affirmed.

JUDGE ALFRED E. DAHLING

COOK, P.J.,

HOFSTETTER, J., Concur.